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No. 71-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PRO-FOOTBALL, INC., NATIONAL FOOTBALL LEAGUE, DISTRICT OF COLUMBIA ARMORY BOARD, ET AL., *Petitioners,*

v.

NORMAN F. HECHT, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents set forth several contentions in opposition to granting the writ. To the extent that their arguments were not anticipated in our petition we reply below. At the outset, however, we note that respondents in their memorandum do not undertake to minimize the importance of the question posed by this case.[1] Indeed,

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[1] This statement is subject to one possible qualification. Under the heading "No Evidence of Congressional Intent to Exempt Armory Board Activities from Antitrust Laws," respondents seem to suggest that the case is of little consequence because it turns on the effect to be given to the phrase "without regard to any other provision of law," a phrase that is special to the D.C. Stadium Act. (Mem. 16-17). But the essential question posed is whether the antitrust laws are meant to be applicable to valid governmental action. That question arises in the context of the D.C. Stadium Act, which makes this case a stronger case than some other might be for holding the antitrust laws inapplicable. The existence of the Stadium Act context, however, does not lessen the significance of the question.

they point up its importance when they assert that "Government agencies, when grouped together, are the largest participant in our economy." (Mem. 7). Thus, it remains true, as respondents told the Court of Appeals (see Pet. 6), that the question presented here is of great importance because of its potential impact on the economy.

A. The Decision Below Conflicts with Decisions of This Court and the Courts of Appeals and Is by No Means Clearly Correct (Mem. 6-8, 9-14).

Decisions of this Court establish that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); see *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939); *Parker* v. *Brown*, 317 U.S. 341 (1943); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). A consequence is that damage resulting proximately from such action cannot be recovered from a private party merely because he induced or participated in the action. See, *e.g.*, *United Mine Workers* v. *Pennington*, *supra* at 671.

Courts of appeals have applied the rationale of these cases to cover exclusive contracts between governments and private parties when negotiated and executed pursuant to proper authority. See *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966). Indeed, one court has gone so far as to hold that antitrust relief cannot be had against a private company for entering into questionable 35-year requirements contracts

because it was directed to do so by a government agency acting within the scope of its authority and discretion to secure a government loan to the company. *Alabama Power Co.* v. *Alabama Elec. Co-op., Inc.*, 394 F. 2d 672, 676-77 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968).

The Court of Appeals in this case decided, contrary to the foregoing decisions, that a provision of a contract between a governmental agency, the Armory Board, and a private party, the Washington Redskins, permitting the Redskins to use Robert F. Kennedy Stadium, a public facility, subjected the parties to possible antitrust liability. It constructed a novel new doctrine calling for application of the antitrust laws to governmental action except where there is the most explicit Congressional direction to the contrary.

Respondents attempt on various grounds to distinguish the prior controlling cases and thus to establish that the decision below is correct and does not conflict with other decisions. Principally they urge that this Court's pertinent opinions mean less than they say. They also attempt to denigrate the status of the Armory Board and its function in managing Robert F. Kennedy Stadium.

As for the first point, it is necessarily for this Court to say what is the scope of the legal propositions established by its decisions. It is true that courts of appeals have lately brought into question the scope of the principle that valid governmental actions are not subject to the antitrust laws. See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir.

1971), *petition for cert. filed,* No. 70-173, O.T. 1971; compare *Gas Light Co. of Columbus* v. *Georgia Power Co.,* 440 F. 2d 1135 (5th Cir. 1971), *petition for cert. filed,* No. 70-290, O.T. 1971; *Washington Gas Light Co.* v. *Virginia Elec. & Power Co.,* 438 F. 2d 248 (4th Cir. 1971). But that is a reason for granting certiorari to resolve the question that has been opened. Review should not be denied on the basis of a litigant's view that novel doctrine enunciated by a court of appeals can somehow be reconciled with what this Court has ruled. We suggest that this Court may have recognized the desirability of resolving the question when it granted the petition for certiorari in *California Motor Transport Co.* v. *Trucking Unlimited,* No. 70-92, O.T. 1971.[1]

As for the respondents' other principal point, we would say only this: The Armory Board is an undoubted agency of government, created by Congress and of equal dignity with any other governmental agency so far as the courts are concerned. In negotiating the terms of the lease of Robert F. Kennedy Stadium to the Redskins, the Board was acting in its own interest as a public agency. It was engaged in

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[1] Respondents attempt to distinguish the Court's granting review in *Trucking Unlimited* on the ground that that case involved the First Amendment right to petition the government. (Mem. 15-16). Only one of five questions presented in the petition in that case, which the Court granted without limitation, is addressed to the First Amendment issue. The Court's earlier denial of certiorari in Paddock Pool Builders, Inc. v. George R. Whitten, Jr., Inc., 400 U.S. 850 (1970), is not a reason for denying certiorari here, as respondents urge. (Mem. 14-15). We have no way of knowing what moved the Court in that case not to grant certiorari, but it is a fact that the conflicts in the lower federal courts over the question of the application of antitrust laws to governmental action were not so evident when that petition was passed upon as they are now. This case and the three cases in addition to *Whitten* cited at pp. 3-4, *supra,* were decided in 1971.

activity at the core of its statutory authority under the D. C. Stadium Act to construct, finance and manage the stadium. For "there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins." (Pet. 8a [District Court], 15a [Court of Appeals]).

The conclusion by the Armory Board of a lease of such significance to its statutory duties is a governmental action that certainly rises to the level of the actions of the Massachusetts Port Authority in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F. 2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), or the Clark County Commission in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F. 2d 341 (9th Cir. 1969). It will not do to say, as respondents do, that the exclusivity provision of the Armory Board's stadium lease is not parallel to the exclusive contract in *Wiggins* because a fixed-base operator at an airport is different from a football team. In each case the action is that of an agency on which a legislature has conferred discretionary authority to manage a public facility. The antitrust laws are inapplicable to transactions that directly result from the exercise of that authority regardless whether the subject matter is the use of a stadium to play professional football or the use of an airport facility to pump gasoline into airplanes.

B. The Judgment Below Is Ripe for Review on Certiorari (Mem. 8-9).

Respondents argue that certiorari should be denied because the judgment below, by which a grant of summary judgment was reversed, is not final. To be sure, lack of finality is a consideration that may affect the decision whether to issue a writ of certiorari to review a court of appeals judgment; indeed the non-final

nature of a judgment may be a sufficient reason in some cases for a denial of a petition. The case cited on this point by respondents in the text of their memorandum, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327 (1967), is an unusual case in which the Court expressly said that it was denying certiorari for want of a final judgment. See also *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916), cited by respondents in a footnote.[1]

This Court nevertheless has the unquestionable *power* to review non-final judgments of the courts of appeals and properly exercises the power where an important question of law is presented or there is a conflict between lower courts. *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth* v. *Hammond*, 166 U.S. 506, 514-15 (1897). Both factors are present here.

The Court, moreover, has a long-standing policy of granting certiorari in a case that otherwise calls for review even though that case has been remanded for trial where the remand is based on a decision on a point of law that is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n. 2 (1947). Certainly the question of the applicability of

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[1] Respondents' other footnoted citations are inapposite. Cobbledick v. United States, 309 U.S. 323 (1940), deals with the requirement of finality for an appeal from a district court to a court of appeals. Slaker v. O'Connor, 278 U.S. 188 (1929), states the well-known rule that this Court's jurisdiction on appeal from the courts of appeals extends only to final judgments.

the antitrust laws is absolutely fundamental to this case, since the case will end without further protracted litigation if the Court of Appeals is found wrong.

Finally—and this, we submit, should be conclusive—*Trucking Unlimited* v. *California Motor Transport Co.*, 432 F. 2d 755 (9th Cir. 1970), *cert. granted*, No. 70-92, O.T. 1971 (June 1, 1971), is in exactly the same procedural status as this case. There a district court dismissed a complaint for failure to state a claim. The court of appeals reversed and remanded for trial. This Court apparently concluded that the antitrust issue posed in that case was sufficiently important to warrant the grant of certiorari in the absence of a final judgment. The same conclusion is compelled here. For each case poses a highly significant dispute over the interpretation of the same line of currently controversial cases.

Respectfully submitted,

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